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No. 02-1215 and 02-1265

IN THE

Supreme Court of the United States

THE PRODUCER COALITION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

EXXONMOBIL GAS MARKETING COMPANY,
A DIVISION OF EXXON MOBIL CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT WILLIAMS GAS PROCESSING-GULF COAST COMPANY, L.P. IN OPPOSITION

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QUESTION PRESENTED

Whether, consistent with this Court's *Chevron* principles, the Court of Appeals for the District of Columbia Circuit properly affirmed orders of the Federal Energy Regulatory Commission which ruled that certain offshore natural gas facilities are "gathering" facilities exempt from the Commission's jurisdiction under section 1(b) of the Natural Gas Act.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the rules of this Court, Respondent Williams Gas Processing-Gulf Coast Company, L.P. ("Williams") states that its direct and indirect parent companies are:

The Williams Companies, Inc.
Williams Energy Services, LLC
Williams Field Services Group, Inc.
Williams Field Services Company
WGP Enterprises, Inc.

Williams states that the only publicly held company that owns 10% or more of its stock is The Williams Companies, Inc.

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BRIEF OF RESPONDENT WILLIAMS GAS PROCESSING-GULF COAST COMPANY, L.P. IN OPPOSITION

Respondent Williams Gas Processing-Gulf Coast Company, L.P. ("Williams") respectfully requests that this Court deny the above-captioned petitions for writs of certiorari,

which seek review of *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071 (D.C. Cir. 2002) ("*ExxonMobil*"). Williams, an intervenor in the proceedings below, owns and operates natural gas gathering and processing facilities on the Outer Continental Shelf ("OCS") of the Gulf of Mexico. In *ExxonMobil*, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") upheld orders of the Federal Energy Regulatory Commission ("FERC" or the "Commission") ruling that certain OCS facilities owned by Respondent Sea Robin Pipeline Company ("Sea Robin") are natural gas "gathering" facilities, which are exempt from FERC's jurisdiction pursuant to section 1(b) of the Natural Gas Act ("NGA"). 15 U.S.C. § 717(b). Petitioners assert that the orders affirmed in *ExxonMobil* reflect an impermissible interpretation of the NGA's gathering exemption. Williams respectfully submits that the D.C. Circuit properly applied the two-step analysis prescribed by this Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), in ruling that FERC's interpretation of NGA section 1(b) is reasonable. Accordingly, review by this Court is unwarranted.

SUMMARY

The central theme of the petitions is that the classification of various of Sea Robin's OCS facilities as exempt "gathering" leaves Sea Robin as an unconstrained monopolist on the OCS and, thus, review of *ExxonMobil* is warranted to protect consumers from unregulated rates on OCS pipelines. But Petitioners fail to mention the most important fact: in *ExxonMobil*, FERC did *not* relinquish jurisdiction over *any rates* on *any* OCS pipeline.

Thus, after *ExxonMobil*, just as before, FERC continues to exercise plenary rate jurisdiction over Sea Robin's entire pipeline system, including the "gathering" facilities at issue here, because Sea Robin remains a "natural gas company" under the NGA. In final, nonappealable rate determinations,

FERC ordered Sea Robin to file gathering rates, found those rates to be "unjust and unreasonable" under NGA section 5, established procedures to set just and reasonable gathering rates, and ultimately approved a settlement (to which the Petitioners are parties) establishing reduced gathering rates.[1] On this basis alone, the petitions should be denied.

Moreover, even under Petitioners' hypothetical case where NGA rate regulation over gathering would be relinquished, there still would not be a regulatory gap. Petitioners' contrary claims disregard the fact that Congress enacted the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331, *et seq.*, to guarantee shippers open and nondiscriminatory access to all OCS pipelines, including NGA-exempt gathering lines.

Finally, *ExxonMobil* is consistent with the decisions of this Court and each of the Circuits that have addressed similar issues. In fact, in an earlier phase of *this case*, on the identical facts, the Fifth Circuit vacated and remanded FERC orders that attempted the same result Petitioners seek here, that is, to assert jurisdiction over Sea Robin's entire system. *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365 (5th Cir. 1997) ("*Sea Robin-I*").[2] Petitioners would jettison the legal basis that has governed more than fifty years of natural gas industry regulation, including the past two decades of industry restructuring that has increased competition and market access through the "unbundling" of natural gas sales, transportation, and gathering services.

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[1] *Sea Robin Pipeline Co.*, 87 FERC ¶ 61,384, at 62,432, ordering para. (C) (1999), *reh'g denied*, 92 FERC ¶ 61,072 (2000), *reh'g denied*, 94 FERC ¶ 61,137, at 61,525 (2001), *on compliance filing*, 95 FERC ¶ 61,329, at 62,172-73, *approving settlement*, 98 FERC ¶ 61,263 (2002).

[2] Dissatisfied with the decision of the Fifth Circuit, Petitioners appealed FERC's remand orders (which divided Sea Robin's system into jurisdictional and nonjurisdictional segments) to the D.C. Circuit, which again rejected Petitioners' position.

STATUTES INVOLVED

In addition to the statutes attached to the petitions, this case involves various provisions of the OCSLA, which are reproduced in the Appendix to this brief.

STATEMENT OF THE CASE

The reclassification of portions of Sea Robin's system as exempt "gathering" is an outgrowth of congressional and regulatory enactments that have restructured the natural gas industry. Since the NGA's inception in 1938, section 1(b) has stated that the NGA "shall not apply to . . . the production or gathering of natural gas." 15 U.S.C. § 717(b). Consistent with that statutory restriction, FERC has never regulated gathering performed by "independent" gatherers, *i.e.*, those that do not also provide bundled NGA-jurisdictional services. In contrast, gathering and production activities performed by interstate pipelines have long been FERC-regulated because those activities were "bundled" with the pipelines' NGA-jurisdictional sales and transportation services.[3]

In the 1970s, the structure of the natural gas industry changed dramatically in response to the failure of gas price controls and resulting gas shortages. *See United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1123 (D.C. Cir. 1996). Those circumstances prompted Congress to enact measures to limit regulation and foster competition in the natural gas industry. For example, the Natural Gas Policy Act of 1978, 15 U.S.C. § 3301, *et seq.*, required the phased deregulation of wellhead prices for certain categories of gas, and later the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60,

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[3] Such authority was recognized by this Court in *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 603 (1945) (NGA "does not preclude the Commission from reflecting the production and gathering facilities of a natural gas company . . . for the purposes of determining the reasonableness of rates subject to its jurisdiction").

103 Stat. 157 (1989), phased out all remaining wellhead price controls. Following Congress' lead, FERC established a program of open-access and nondiscriminatory transportation, and later mandated the unbundling of gas sales and interstate transportation. *Conoco Inc. v. FERC*, 90 F.3d 536, 539-40 (D.C. Cir. 1996). Congress saw the Commission's implementation of open-access transportation as "essential" to its decision to deregulate wellhead sales. *See United Distribution,* 88 F.3d at 1125.

This restructuring ended the interstate pipelines' decades-old role as merchants of bundled service (*i.e.*, purchasing, gathering, transporting, and reselling natural gas as a single service) and transformed them into open-access transporters, effectively serving as common carriers. *See id.* at 1122-30. Absent their former merchant sales obligations, pipelines no longer needed to own extensive gathering systems to secure gas supplies (*see Conoco,* 90 F.3d at 539-41), and pipelines began "unbundling" their NGA-exempt gathering facilities from their NGA-regulated transportation facilities. To assure implementation of these policies, FERC required pipelines to "separately identify cost components attributable to transportation, storage, and gathering costs."[4] With gathering "unbundled" as a stand-alone service, various interstate pipelines transferred their gathering facilities to non-NGA-regulated companies that could compete on equal footing with non-NGA-regulated independent gatherers, such as a number of the Petitioners (or their affiliates). *See Conoco*, 90 F.3d at 541. Over the past two decades, onshore pipelines

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[4] *Policy Statement Providing Guidance with Respect to the Designing of Rates*, 47 FERC ¶ 61,295, at 62,059 (1989), (quoting regulations now codified at 18 C.F.R. § 284.10(c)(2)). *See also Natural Gas Gathering Services Performed by Interstate Pipelines and Interstate Pipeline Affiliates*, 65 FERC ¶ 61,136, at 61,690 (1993) ("The Commission has required gathering rates to be separately stated and unbundled from mainline transportation rates in a number of restructuring cases.").

have largely completed their unbundling of gathering, and offshore pipelines, such as Sea Robin, likewise have requested FERC determinations to identify and unbundle their NGA-exempt gathering facilities.[5]

In tandem with these pro-competitive restructuring initiatives, Congress amended and strengthened the OCSLA to ensure the expeditious and orderly development of OCS resources consistent with certain "competitive principles" to protect OCS shippers. *See* OCSLA Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (1978). Among other things, the OCSLA requires *all* OCS pipelines to "provide open and nondiscriminatory access to both owner and nonowner shippers." 43 U.S.C. § 1334(f)(1)(A).

REASONS FOR DENYING THE PETITIONS

A. This Case Is Not Appropriate For Review Because The Claimed Harm To Consumers Is Non-Existent.

Petitioners claim that review is necessary to protect the reliance interests of gas producers arising from prior NGA regulation of OCS facilities, and to protect gas consumers from unregulated rates on OCS pipelines. Petitioners' contention has no merit. The harm alleged in their petitions does not exist here because FERC has not relinquished NGA rate jurisdiction over *any* of the facilities at issue.

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[5] Originally, Sea Robin requested a declaratory order that its *entire* pipeline system functions as NGA-exempt gathering. FERC denied that request, ruling that Sea Robin's *entire* system is jurisdictional. *Sea Robin Pipeline Co.*, 71 FERC ¶ 61,351 (1995), *reh'g denied*, 75 FERC ¶ 61,332 (1996). On appeal in *Sea Robin-I*, the Fifth Circuit vacated and remanded FERC's orders. On remand, FERC ruled that the portion of Sea Robin's system upstream of the Vermilion 149 Station is NGA-exempt gathering, while the portion downstream of that point is jurisdictional. Petitioners appealed FERC's remand orders in *ExxonMobil*.

Specifically, notwithstanding FERC's determination that a portion of Sea Robin's OCS facilities constitute exempt "gathering" under NGA section 1(b), FERC ruled that it has full NGA rate authority over Sea Robin's entire offshore system, including its gathering facilities:

> Sea Robin also asserts that the Commission lacks the authority to require Sea Robin to file gathering rates after revoking its NGA Section 7 certificate for the gathering facilities. Sea Robin is incorrect. In *Northern Natural Gas Company, Division of Enron Corp. v. FERC*, 929 F.2d 1261, 1263 (8th Cir. 1991), *cert. denied*, 502 U.S. 856 (1991), the Court ruled that the FERC "may regulate rates charged for transportation on the company's own gathering facilities performed *in connection with* jurisdictional interstate transportation." Here, Sea Robin still owns the subject gathering facilities that are used to bring gas to the jurisdictional portion of its system where the gas continues on its way in interstate commerce. As a result, *Sea Robin's gathering rates are within the Commission's rate jurisdiction under the NGA.*

Sea Robin, 94 FERC at 61,525 (emphasis added) (footnote omitted). Moreover, FERC exercised its NGA authority in ruling that Sea Robin's rates, including its gathering rates, are "unjust and unreasonable" and requiring Sea Robin to file "separately stated, fully allocated, cost-based rates for [its] transportation and gathering services." *Sea Robin*, 95 FERC at 61,172 (footnote omitted). It bears emphasis that the Petitioners participated in Sea Robin's rate proceeding and successfully argued that FERC should require Sea Robin to reduce its rates for gathering and other services.

In short, the lynchpin of Petitioners' claims regarding the necessity for this Court's review, specifically, FERC's

purported relinquishment of NGA rate jurisdiction, is non-existent. For that reason alone, review by this Court cannot be justified.

B. Even Under Petitioners' Hypothetical Of Discontinued FERC Rate Regulation, There Is No "Regulatory Gap" With Respect To OCS Gathering Lines.

Moreover, even assuming the validity of Petitioners' hypothetical, *i.e.*, the absence of NGA regulation over OCS gathering lines, no regulatory gap would result, contrary to Petitioners' claims.[6] That is because the OCSLA protects all shippers on all OCS pipelines, including NGA-exempt gathering lines.

When Congress amended the OCSLA in 1978 (at about the same time that it commenced partial decontrol of wellhead gas prices), it specifically rejected an amendment to extend NGA jurisdiction to all OCS gas pipelines. 124 Cong. Rec. 2092-93 (Feb. 2, 1978). Moreover, Congress recognized that "the Outer Continental Shelf is a vital national resource . . . which should be made available for expeditious and orderly development . . . in a manner which is consistent with the maintenance of *competition* and other national needs." 43 U.S.C. § 1332(3) (emphasis added). *See also* 43 U.S.C. § 1801(7) (finding that the OCS must be managed "to preserve and maintain competition"); 43 U.S.C. § 1802(2)(D) (a purpose of the Act is "to preserve and maintain free enterprise competition");

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[6] Of course, a purported "regulatory gap" cannot support Commission jurisdiction over facilities that otherwise qualify as exempt "gathering." *ExxonMobil*, 297 F.3d at 1088 ("We emphatically agree that 'need for regulation cannot alone create authority to regulate'") (quoting *Sea Robin-I*, 127 F.3d at 371); *Northwest Pipeline Co. v. FERC*, 905 F.2d 1403, 1412 (10th Cir. 1990) ("If, upon proper application of the primary function test, the facilities are indeed exempt from Commission jurisdiction, whatever 'attractive [regulatory] gap' results was clearly created by Congress.").

43 U.S.C. § 1334(a) (requiring consultation with the Attorney General on "matters which may affect competition"); 43 U.S.C. § 1334(f) (mandating "competitive principles" to govern OCS pipeline operations).

Chief among those "competitive principles" was Congress' mandate that all OCS pipelines "must provide open and nondiscriminatory access to both owner and nonowner shippers." 43 U.S.C. § 1334 (f)(1)(A). Other sections of the OCSLA allow FERC in appropriate circumstances to allocate pipeline capacity in "proportionate amounts" (43 U.S.C. § 1334 (e)), order pipeline expansions (43 U.S.C. § 1334 (f)(1)(B)), and condition permits to ensure compliance with the OCSLA's "competitive principles." 43 U.S.C. § 1334 (f)(1). Violators of the OCSLA are subject to injunctions and civil and criminal penalties (43 U.S.C. § 1350), as well as citizens suits. 43 U.S.C. § 1349. To implement these congressional mandates, FERC policy calls for vigorous response to complaints filed pursuant to the OCSLA by shippers on OCS gathering pipelines. *OCS Policy Statement*, 74 FERC ¶ 61,222, at 61,758 (1996).

In short, Congress was well aware that its OCSLA regulatory scheme would leave OCS "gathering" pipelines exempt from NGA rate regulation, but chose instead to regulate OCS pipelines by enhancing "competition" and providing comprehensive mechanisms, described above, to prevent abuse in the marketplace. Thus, Congress avoided the purported "regulatory gap" about which Petitioners complain.

C. *ExxonMobil* Is Consistent With Decisions Of This Court And Other Circuits.

The decision below properly applied *Chevron's* two-step analysis in reviewing FERC's interpretation of the term "gathering" as used in NGA section 1(b). In that regard, no party disputes that, in the NGA, Congress has not "directly

spoken to" the meaning of the term "gathering." *Chevron*, 467 U.S. at 842. Thus, the reviewing court's task is to determine "whether the agency's answer is based on a permissible construction of the statute" (*id.* at 843), and it must accord "deference" and "considerable weight" to the agency's construction of the statute. *Id.* at 844. Ignoring *Chevron*, Petitioners argue that FERC's interpretation of NGA section 1(b) conflicts with *Northern Natural Gas Co. v. State Corp. Commission*, 372 U.S. 84 (1963) and other decisions of this Court and the Circuits. Petitioners' position is seriously flawed.

1. *Northern Natural* is a preemption case that concerned orders of the Kansas State Corporation Commission attempting to regulate the manner in which pipelines purchase gas from production fields for resale in interstate markets. The Corporation Commission's orders required each pipeline to purchase gas "ratably" from all Kansas wells to which a given pipeline was connected. *Id.* at 86. This Court rejected the argument that the NGA's "gathering or production" exemption allowed the state to dictate the manner in which sales are made in interstate markets. *Id.* at 89-93. The Court explained that "'production' and 'gathering' are terms narrowly confined to the *physical* acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Id.* at 90 (emphasis added). Petitioners distort the holding of *Northern Natural*, which recognized the "physical" basis for NGA-exempt gathering, as distinct from "business" activities such as gas sales conducted from the gathering facilities. *See also Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 678, 681 (1954) ("the 'production or gathering' exemption applies to the physical activities, facilities, and properties used in the production and gathering

of natural gas," but not to "the 'business' of production or gathering, with the sale of the product considered an integral part of such 'business.'").[7]

The jurisdictional determination affirmed below is fully consistent with the "physical" nature of gathering recognized in *Northern Natural* and *Phillips*. Indeed, for over fifty years, the Commission has distinguished non-jurisdictional *gathering* from jurisdictional *transportation* based on various "physical criteria," and since 1983 those criteria have been embodied in the Commission's "primary function" test. *ExxonMobil*, 297 F.3d at 1077. In this case, the Commission considered "13 *physical factors* . . . in concluding that the [Sea Robin] facilities upstream of the Vermilion 149 Station are engaged in non-jurisdictional gathering." *Id.* at 1081 (emphasis added). Moreover, the Sea Robin system "carries a raw stream of unpurified natural gas and liquid hydrocarbons taken directly from the gas wells" (*id.* at 1078), and delivers the raw gas to compressor stations and processing plants near Erath, Louisiana, "where the gas is separated, dehydrated, and processed . . . [in preparation] for delivery to downstream transmission pipelines at five nearby entry points." *Id.* Such physical factors are fully consistent with the Court's recognition in *Northern Natural* that gathering involves "preparing [the gas] for the first stages of distribution."[8] 372 U.S. at 90.

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[7] Additionally, while *Phillips* held that producer sales for resale in interstate commerce are subject to FERC's jurisdiction, *Phillips* left intact FERC's (then the Federal Power Commission) NGA exemption for gas processing plants and the pipelines delivering gas to them. *See Phillips Petroleum Co.*, 10 FPC 246, 277-78 (1951).

[8] The fact that Sea Robin's *entire* system moves raw, unprocessed gas to Erath for processing indicates that Sea Robin's *entire* system may serve an NGA-exempt gathering function, as Sea Robin contended in its original petition to FERC. *See supra* note 5. Indeed, the court below (297 F.3d. at 1084) stated: "Were we the Federal Energy Regulatory Com-

Ignoring the "physical" realities of gathering recognized in *Northern Natural* and *Phillips* (as well as over fifty years of Commission practice), Petitioners argue that "[i]n section 1(b) of the NGA, Congress adopted the 'mechanical' line of this Court's Commerce Clause cases 'as the statutory line dividing federal and state jurisdiction'" (Petition No. 02-1265 at 13) (internal quotes omitted), and that the scope of gathering is limited by a purported "congressional intent to occupy the field of interstate commerce in natural gas." *Id.* at 18. Petitioners' theory is flatly contradicted by this Court's recognition that:

> When it enacted the NGA, Congress carefully divided up regulatory power over the natural gas industry. *It "did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power.* Rather it contemplated the exercise of federal power as specified in the Act."

Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 510 (1989) (quoting *FPC v. Panhandle E. Pipe Line Co.*, 337 U.S. 498, 502-03 (1949)) (emphasis added). Recognizing Congress' careful limitation of federal authority under the NGA, in *Northwest Central* the Court explained that section 1(b)'s gathering and production exemption,

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mission, we might draw the [jurisdictional] line at Erath." However, the issue of whether FERC should have found Sea Robin's *entire* system nonjurisdictional was not before the court in *ExxonMobil* because Sea Robin did not appeal FERC's orders on remand in *Sea Robin-I*. Additionally, despite Petitioners' repeated references to "consumer protection" concerns, the *raw, unprocessed* gas moved by Sea Robin is not suitable for sale to consumer markets and indeed no such consumer markets exist on the OCS. Rather, in the restructured natural gas industry, gas prices are set by competitive forces at the market or market "hubs" well downstream of the field, while upstream producers and transporters (including gatherers) allocate their respective shares of the downstream market-set price on a "netback" basis. *See Shell Gas Pipeline Co.*, 78 FERC ¶ 61,192, at 61,828-29 (1997) (Santa, Comm'r dissenting).

"expressly reserv[ed] to the States the power to regulate, among other things 'the production or gathering of natural gas,' that is, 'the physical acts of drawing gas from the earth and preparing it for the first stages of distribution.'" *Id.* (quoting *Northern Natural*, 372 U.S. at 90). Thus, Petitioners' theory that Congress defined the NGA gathering exemption as narrowly as constitutionally permissible is conclusively refuted by *Northwest Central's* recognition that the NGA's gathering exemption is *not* constricted by "federal regulation . . . to the limit of constitutional power." *Id.*

Finally, the erroneous nature of Petitioners' restrictive interpretation of NGA section 1(b) is also demonstrated by the fact that gathering commonly occurs in very large pipeline networks that extend *across state borders* and undeniably operate in interstate commerce. In fact, the gathering systems involved in *Phillips* consisted of "nine such networks of pipelines" of which "five are located entirely in Texas, one in Oklahoma, one in New Mexico, and *two extend in both Texas and Oklahoma.*"[9] *Phillips*, 347 U.S. at 675 (emphasis added).

2. *ExxonMobil* is also consistent with decisions of other Circuits that have addressed the scope of NGA-exempt gathering. While Petitioners strain to portray a conflict

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[9] Likewise, a number of Circuit decisions have recognized that NGA-exempt gathering can occur in large pipeline systems operating in interstate commerce. *See e.g.*, *Pac. Gas & Elec. Co. v. FERC*, 106 F.3d 1190, 1193 (5th Cir. 1997) (affirming the Commission's relinquishment of NGA jurisdiction over twenty-nine gathering facilities in New Mexico, Colorado, Oklahoma, and Texas); *Northwest Pipeline*, 905 F.2d at 1404 (overturning FERC's assertion of jurisdiction over six gathering facilities in Colorado and Utah); *Conoco*, 90 F.3d at 541-50 (affirming FERC's relinquishment of jurisdiction over gathering facilities located at 105 sites in Arkansas, Louisiana, Oklahoma, and Texas); and *Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1195-98 (D.C. Cir. 2000) (affirming FERC's relinquishment of jurisdiction over a gathering system located in New York and Pennsylvania).

among the Circuits, just the opposite is true.[10] The Circuits that have addressed this issue have unanimously endorsed a multi-factor analysis to identify NGA-exempt gathering facilities based on the physical criteria of the Commission's "primary function" test. In fact, in an earlier phase of these proceedings, the Fifth Circuit—just like the D.C. Circuit in *ExxonMobil*—specifically rejected the Petitioners' position on the merits. Thus, in *Sea Robin-I* the Fifth Circuit vacated and remanded the Commission's initial orders attempting to assert jurisdiction over Sea Robin's *entire* pipeline system, *i.e.*, the jurisdictional result advocated by Petitioners. The Fifth Circuit recognized that "Congress drew a distinction based on the *physical* patterns of the industry, gathering versus transporting," and admonished the Commission for placing too much reliance on "*non*-physical" factors. *Sea Robin-I*, 127 F.3d at 371 (emphasis added). The Fifth Circuit held that "[i]f the Commission is to remain tethered to statute, as it must, that [jurisdictional] inquiry must be based primarily on *physical* criteria and the *realities of the field*." *Id.* (emphasis added). The Fifth Circuit even suggested that FERC might (as FERC, in fact, did) adopt the Vermilion Compressor Station as the jurisdictional demarcation point:

> Discomfort in drawing jurisdictional lines at points internal to an overall system may be soothed with the reminder that Congress did not intend to extend FERC's jurisdiction to all natural gas pipelines; indeed it demands the drawing of jurisdictional lines, even when the end of gathering is not easily located (consider, for

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[10] Petitioners cite Circuit cases applying the unsurprising principle that exceptions to a primary grant of authority should be strictly construed (*see* Petition No. 02-1265 at 18), a principle with which *ExxonMobil* and the subject FERC orders are fully consistent, as demonstrated by FERC's very conservative approach to relinquishing jurisdiction in the face of record facts supporting a much broader nonjurisictional finding. *See supra* note 8.

> example, a distinction between the field south of the Vermillion [sic] Compressor Station and the pipelines leading north to Erath, Louisiana).

Id. In sum, *ExxonMobil* is fully consistent with the holding and reasoning of the Fifth Circuit's decision on the identical facts in *Sea Robin-I*. Indeed, the instant Petitions are effectively collateral attacks on *Sea Robin-I*.

Additionally, in *EP Operating Co. v. FERC*, 876 F.2d 46 (5th Cir. 1989), the Fifth Circuit reversed the Commission's attempt to assert jurisdiction over a 51-mile OCS pipeline. The court expressly rejected the theory (espoused by Petitioners in the proceedings below) that exempt "gathering" ends at the upstream floating platforms where gas is produced. *Id.* at 49. The court ruled that the Commission's jurisdictional determination under the "primary function" test must be based on "consideration of all the facts and circumstances . . . rather than application of any overarching bright line standards" (*id.* at 48), and found that the subject 51-mile pipeline functioned as "an integral part of the natural gas gathering system" because it "is simply the most practical way to move the product from the seabed to a point nearer shore where it can be processed and introduced into a pipeline." *Id.* at 49.

Similarly, in *Northwest Pipeline* the Tenth Circuit overturned the Commission's attempt to assert jurisdiction over various gathering facilities owned by an interstate pipeline and rejected the Commission's argument that "ultimately, the facilities are owned by and eventually connected to a company which *has as its primary function* the interstate transportation of gas." 905 F.2d at 1410. The Tenth Circuit emphasized that "[t]he gathering exemption was not meant to attach only to certain owners/operators but to facilities" (*id.* at 1411), and found that the physical factors of the Com-

mission's primary function analysis had been improperly "subsumed" by the non-physical ownership consideration. *Id.* at 1409-11.[11]

D. NGA Section 7(b) Abandonment Requirements Do Not Apply To NGA-Exempt Gathering Facilities.

Nor is there any merit to Petitioners' claim that FERC was required to conduct a public interest "abandonment" analysis under NGA section 7(b) with respect to facilities found to be NGA-exempt gathering. Petition No. 1265 at 22-27. First, as a practical matter, Sea Robin did not "abandon" any services (*i.e.*, service was not terminated to any customers). *See ExxonMobil*, 297 F.3d at 1088. Second, and more fundamentally, in *Panhandle*, 337 U.S. at 509, this Court, relying on the plain words of the statute, held that the abandonment requirements of NGA section 7(b) apply only to "facilities subject to the jurisdiction of the Commission," and not to "gathering" facilities exempt from the NGA under section 1(b). The Court rejected arguments of the Federal Power Commission (now FERC) that otherwise exempt production or gathering facilities would nevertheless be subject to section 7(b):

> The argument here is that since natural gas is the "lifeblood" of a pipe-line system, a company by disposing of its gas reserves, unhampered by Commission control, may render itself unable to continue service; consequently abandonment of facilities and service without the consent of the Commission will result. The argument begs the

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[11] Finally, Petitioners argue that FERC's nonjurisdictional determination for portions of Sea Robin's system must be unreasonable because a jurisdictional pipeline (the Garden Banks pipeline) interconnects with Sea Robin's gathering facilities. However, the *ExxonMobil* court properly disposed of that argument noting that in prior cases presenting such a circumstance, the *jurisdictional upstream* pipeline was ultimately reclassified, which "suggests that it is the Garden Banks pipeline, rather than Sea Robin, that has been erroneously classified." 297 F.3d at 1087.

question. *The section, like those above, covers only "facilities subject to the jurisdiction of the Commission."*

To accept these arguments springing from power to allow interstate service, fix rates, and control abandonment would establish wide control by the Federal Power Commission over the production and gathering of gas. It would invite expansion of power into other phases of the forbidden area. It would be an assumption of powers specifically denied the Commission by the words of the Act . . . .

Id. at 509 (footnotes omitted) (emphasis added).[12]

CONCLUSION

Wherefore, Respondent Williams Gas Processing-Gulf Coast Company respectfully submits that the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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[12] The abandonment cases cited by Petitioner (Petition No. 02-1265 at 22-25) are off point. In *ExxonMobil*, the subject service was *NGA-exempt* gathering, while the cases cited by Petitioner involved the abandonment of *NGA-jurisdictional* sales or transportation services.

APPENDIX

APPENDIX

Excerpts from Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.*

43 U.S.C. § 1332 (2003)

§ 1332. Congressional declaration of policy

It is hereby declared to be the policy of the United States that—

(1) the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act;

(2) this Act shall be construed in such a manner that the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected;

(3) the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs;

(4) since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal States, and on other affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments—

(A) such States and their affected local governments may require assistance in protecting their coastal zones and other affected areas from any temporary or permanent adverse effects of such impacts;

(B) the distribution of a portion of the receipts from the leasing of mineral resources of the outer Continental Shelf adjacent to State lands, as provided under section 8(g) [43 U.S.C. § 1337(g)], will provide affected coastal States and localities with funds which may be used for the mitigation of adverse economic and environmental effects related to the development of such resources; and

(C) such States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf[.;]

(5) the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized; and

(6) operations in the outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.

43 U.S.C. § 1334 (2003)

§ 1334. Administration of leasing

(a) Rules and regulations; amendment; cooperation with State agencies; subject matter and scope of regulations.

The Secretary shall administer the provisions of this Act relating to the leasing of the outer Continental Shelf, and shall

prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall, as of their effective date, apply to all operations conducted under a lease issued or maintained under the provisions of this Act. In the enforcement of safety, environmental, and conservation laws and regulations, the Secretary shall cooperate with the relevant departments and agencies of the Federal Government and of the affected States. In the formulation and promulgation of regulations, the Secretary shall request and give due consideration to the views of the Attorney General with respect to matters which may affect competition. In considering any regulations and in preparing any such views, the Attorney General shall consult with the Federal Trade Commission. The regulations prescribed by the Secretary under this subsection shall include, but not be limited to, provisions—

(1) for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facilities, or (B) if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment, and for the extension of any permit or lease affected by suspension or prohibition under clause (A) or (B) by a period equivalent to the period of such suspension or prohibition, except that no permit or lease shall be so extended when such suspension or prohibition is the result of

gross negligence or willful violation of such lease or permit, or of regulations issued with respect to such lease or permit;

(2) with respect to cancellation of any lease or permit—

(A) that such cancellation may occur at any time, if the Secretary determines, after a hearing, that—

(i) continued activity pursuant to such lease or permit would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment;

(ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time; and

(iii) the advantages of cancellation outweigh the advantages of continuing such lease or permit in force;

(B) that such cancellation shall not occur unless and until operations under such lease or permit shall have been under suspension, or temporary prohibition, by the Secretary, with due extension of any lease or permit term continuously for a period of five years, or for a lesser period upon request of the lessee;

(C) that such cancellation shall entitle the lessee to receive such compensation as he shows to the Secretary as being equal to the lesser of (i) the fair value of the canceled rights as of the date of cancellation, taking account of both anticipated revenues from the lease and anticipated costs, including costs of compliance with all applicable regulations and operating orders, liability for cleanup costs or damages, or both, in the case of an oilspill, and all other costs reasonably anticipated on the lease, or (ii) the excess, if any, over the lessee's revenues, from the lease (plus interest thereon from the date of receipt to date of reimbursement) of all consideration paid for the lease and all direct expenditures

made by the lessee after the date of issuance of such lease and in connection with exploration or development, or both, pursuant to the lease (plus interest on such consideration and such expenditures from date of payment to date of reimbursement), except that (I) with respect to leases issued before the date of enactment of this subparagraph [enacted Sept. 18, 1978], such compensation shall be equal to the amount specified in clause (i) of this subparagraph; and (II) in the case of joint leases which are canceled due to the failure of one or more partners to exercise due diligence, the innocent parties shall have the right to seek damages for such loss from the responsible party or parties and the right to acquire the interests of the negligent party or parties and be issued the lease in question;

(3) for the assignment or relinquishment of a lease;

(4) for unitization, pooling, and drilling agreements;

(5) for the subsurface storage of oil and gas other than by the Federal Government;

(6) for drilling or easements necessary for exploration, development, and production;

(7) for the prompt and efficient exploration and development of a lease area; and

(8) for compliance with the national ambient air quality standards pursuant to the Clean Air Act (42 U.S.C.§ 7401 *et seq.*), to the extent that activities authorized under this Act significantly affect the air quality of any State.

(b) Compliance with regulations as condition for issuance, continuation, assignment, or other transfer of leases.

The issuance and continuance in effect of any lease, or of any assignment or other transfer of any lease, under the provisions of this Act shall be conditioned upon compliance with regulations issued under this Act.

(c) Cancellation of nonproducing lease.

Whenever the owner of a nonproducing lease fails to comply with any of the provisions of this Act, or of the lease, or of the regulations issued under this Act, such lease may be canceled by the Secretary, subject to the right of judicial review as provided in this Act, if such default continues for the period of thirty days after mailing of notice by registered letter to the lease owner at his record post office address.

(d) Cancellation of producing lease.

Whenever the owner of any producting lease fails to comply with any of the provisions of this Act, of the lease, or of the regulations issued under this Act, such lease may be forfeited and canceled by an appropriate proceeding in any United States district court having jurisdiction under the provisions of this Act.

(e) Pipeline rights of way; forfeiture of grant.

Rights-of-way through the submerged lands of the outer Continental Shelf, whether or not such lands are included in a lease maintained or issued pursuant to this Act, may be granted by the Secretary for pipeline purposes for the transportation of oil, natural gas, sulphur, or other minerals, or under such regulations and upon such conditions as may be prescribed by the Secretary, or where appropriate the Secretary of Transportation, including (as provided in section 21(b) of this Act [43 U.S.C. § 1347(b)]) assuring maximum environmental protection by utilization of the best available and safest technologies, including the safest practices for pipeline burial and upon the express condition that oil or gas pipelines shall transport or purchase without discrimination, oil or natural gas produced from submerged lands or outer Continental Shelf lands in the vicinity of the pipelines in such proportionate amounts as the Federal Energy Regulatory Commission, in consultation with the Secretary of Energy, may, after a full hearing with due notice thereof to the

interested parties, determine to be reasonable, taking into account, among other things, conservation and the prevention of waste. Failure to comply with the provisions of this section or the regulations and conditions prescribed under this section shall be ground for forfeiture of the grant in an appropriate judicial proceeding instituted by the United States in any United States district court having jurisdiction under the provisions of this Act.

(f) Competitive principles governing pipeline operation.

(1) Except as provided in paragraph (2), every permit, license, easement, right-of-way, or other grant of authority for the transportation by pipeline on or across the outer Continental Shelf of oil or gas shall require that the pipeline be operated in accordance with the following competitive principles:

(A) The pipeline must provide open and nondiscriminatory access to both owner and nonowner shippers.

(B) Upon the specific request of one or more owner or nonowner shippers able to provide a guaranteed level of throughput, and on the condition that the shipper or shippers requesting such expansion shall be responsible for bearing their proportionate share of the costs and risks related thereto, the Federal Energy Regulatory Commission may, upon finding, after a full hearing with due notice thereof to the interested parties, that such expansion is within technological limits and economic feasibility, order a subsequent expansion of throughput capacity of any pipeline for which the permit, license, easement, right-of-way, or other grant of authority is approved or issued after the date of enactment of this subparagraph [enacted Sept. 18, 1978]. This subparagraph shall not apply to any such grant of authority approved or issued for the Gulf of Mexico or the Santa Barbara Channel.

(2) The Federal Energy Regulatory Commission may, by order or regulation, exempt from any or all of the

requirements of paragraph (1) of this subsection any pipeline or class of pipelines which feeds into a facility where oil and gas are first collected or a facility where oil and gas are first separated, dehydrated, or otherwise processed.

(3) The Secretary of Energy and the Federal Energy Regulatory Commission shall consult with and give due consideration to the views of the Attorney General on specific conditions to be included in any permit, license, easement, right-of-way, or grant of authority in order to ensure that pipelines are operated in accordance with the competitive principles set forth in paragraph (1) of this subsection. In preparing any such views, the Attorney General shall consult with the Federal Trade Commission.

(4) Nothing in this subsection shall be deemed to limit, abridge, or modify any authority of the United States under any other provision of law with respect to pipelines on or across the outer Continental Shelf.

(g) Rates of production.

(1) The leasee [lessee] shall produce any oil or gas, or both, obtained pursuant to an approved development and production plan, at rates consistent with any rule or order issued by the President in accordance with any provision of law.

(2) If no rule or order referred to in paragraph (1) has been issued, the lessee shall produce such oil or gas, or both, at rates consistent with any regulation promulgated by the Secretary of Energy which is to assure the maximum rate of production which may be sustained without loss of ultimate recovery of oil or gas, or both, under sound engineering and economic principles, and which is safe for the duration of the activity covered by the approved plan. The Secretary may permit the lessee to vary such rates if he finds that such variance is necessary.

(h) Federal action affecting outer Continental Shelf; notification; recommended changes.

The head of any Federal department or agency who takes any action which has a direct and significant effect on the outer Continental Shelf or its development shall promptly notify the Secretary of such action and the Secretary shall thereafter notify the Governor of any affected State and the Secretary may thereafter recommend such changes in such action as are considered appropriate.

(i) Flaring of natural gas.

After the date of enactment of this section [enacted Sept. 18, 1978], no holder of any oil and gas lease issued or maintained pursuant to this Act shall be permitted to flare natural gas from any well unless the Secretary finds that there is no practicable way to complete production of such gas, or that such flaring is necessary to alleviate a temporary emergency situation or to conduct testing or work-over operations.

(j) Cooperative development of common hydrocarbon-bearing areas.

(1) Findings. [(A)] The Congress of the United States finds that the unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing geological area underlying the Federal and State boundary may result in a number of harmful national effects, including—

(i) the drilling of unnecessary wells, the installation of unnecessary facilities and other imprudent operating practices that result in economic waste, environmental damage, and damage to life and property;

(ii) the physical waste of hydrocarbons and an unnecessary reduction in the amounts of hydrocarbons that can be produced from certain hydrocarbon-bearing areas; and

(iii) the loss of correlative rights which can result in the reduced value of national hydrocarbon resources and disorders in the leasing of Federal and State resources.

(2) Prevention of harmful effects. The Secretary shall prevent, through the cooperative development of an area, the harmful effects of unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing area underlying the Federal and State boundary.

43 U.S.C. § 1349 (2003)

§ 1349. Citizens suits, jurisdiction and judicial review

(a) Persons who may bring actions; persons against whom action may be brought; time of action; intervention by Attorney General; costs and fees; security.

(1) Except as provided in this section, any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this Act against any person, including the United States, and any other government instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution) for any alleged violation of any provision of this Act or any regulation promulgated under this Act, or of the terms of any permit or lease issued by the Secretary under this Act.

(2) Except as provided in paragraph (3) of this subsection, no action may be commenced under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation, in writing under oath, to the Secretary and any other appropriate Federal official, to the State in which the violation allegedly occurred or is occurring, and to any alleged violator; or

(B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States or a State with respect to such matter, but in any such action in a court of the United States any person having a legal interest which is or may be adversely affected may intervene as a matter of right.

(3) An action may be brought under this subsection immediately after notification of the alleged violation in any case in which the alleged violation constitutes an imminent threat to the public health or safety or would immediately affect a legal interest of the plaintiff.

(4) In any action commenced pursuant to this section, the Attorney General, upon the request of the Secretary or any other appropriate Federal official, may intervene as a matter of right.

(5) A court, in issuing any final order in any action brought pursuant to subsection (a)(1) or subsection (c) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party, whenever such court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in a sufficient amount to compensate for any loss or damage suffered, in accordance with the Federal Rules of Civil Procedure.

(6) Except as provided in subsection (c) of this section, all suits challenging actions or decisions allegedly in violation of, or seeking enforcement of, the provisions of this Act, or any regulation promulgated under this Act, or the terms of any permit or lease issued by the Secretary under this Act, shall be undertaken in accordance with the procedures described in this subsection. Nothing in this section shall restrict any right which any person or class of persons may have under any other Act or common law to seek appropriate relief.

(b) Jurisdiction and venue of actions.

(1) Except as provided in subsection (c) of this section, the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this Act. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose.

(2) Any resident of the United States who is injured in any manner through the failure of any operator to comply with any rule, regulation, order, or permit issued pursuant to this Act may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district having jurisdiction under paragraph (1) of this subsection.

(c) Review of Secretary's approval of leasing program; review of approval, modification or disapproval of exploration or production plan; persons who may seek review; scope of review; certiorari to Supreme Court.

(1) Any action of the Secretary to approve a leasing program pursuant to section 18 [43 U.S.C. § 1344] of this Act shall be subject to judicial review only in the United States Court of Appeal [Appeals] for the District of Columbia.

(2) Any action of the Secretary to approve, require modification of, or disapprove any exploration plan or any development and production plan under this Act shall be subject to judicial review only in a United States court of appeals for a circuit in which an affected State is located.

(3) The judicial review specified in paragraphs (1) and (2) of this subsection shall be available only to a person who (A) participated in the administrative proceedings related to the actions specified in such paragraphs, (B) is adversely affected or aggrieved by such action, (C) files a petition for review of the Secretary's action within sixty days after the date of such action, and (D) promptly transmits copies of the petition to the Secretary and to the Attorney General.

(4) Any action of the Secretary specified in paragraph (1) or (2) shall only be subject to review pursuant to the provisions of this subsection, and shall be specifically excluded from citizen suits which are permitted pursuant to subsection (a) of this section.

(5) The Secretary shall file in the appropriate court the record of any public hearings required by this Act and any additional information upon which the Secretary based his decision, as required by section 2112 of title 28, United States Code. Specific objections to the action of the Secretary shall be considered by the court only if the issues upon which such objections are based have been submitted to the Secretary during the administrative proceedings related to the actions involved.

(6) The court of appeals conducting a proceeding pursuant to this subsection shall consider the matter under review solely on the record made before the Secretary. The findings of the Secretary, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the Secretary for such further action as it may direct.

(7) Upon the filing of the record with the court, pursuant to paragraph (5), the jurisdiction of the court shall be exclusive and its judgment shall be final, except that such judgment

shall be subject to review by the Supreme Court of the United States upon writ of certiorari.

(d) [Repealed]

43 U.S.C. § 1350 (2003)

§ 1350. Remedies and procedures

(a) Injunctions, restraining orders, etc.

At the request of the Secretary, the Secretary of the Army, or the Secretary of the Department in which the Coast Guard is operating, the Attorney General or a United States attorney shall institute a civil action in the district court of the United States for the district in which the affected operation is located for a temporary restraining order, injunction, or other appropriate remedy to enforce any provision of this Act, any regulation or order issued under this Act, or any term of a lease, license, or permit issued pursuant to this Act.

(b) Civil penalties; hearing.

(1) Except as provided in paragraph (2), if any person fails to comply with any provision of this Act, or any term of a lease, license, or permit issued pursuant to this Act, or any regulation or order issued under this Act, after notice of such failure and expiration of any reasonable period allowed for corrective action, such person shall be liable for a civil penalty of not more than $ 20,000 for each day of the continuance of such failure. The Secretary may assess, collect, and compromise any such penalty. No penalty shall be assessed until the person charged with a violation has been given an opportunity for a hearing. The Secretary shall, by regulation at least every 3 years, adjust the penalty specified in this paragraph to reflect any increases in the Consumer Price Index (all items, United States city average) as prepared by the Department of Labor.

(2) If a failure described in paragraph (1) constitutes or constituted a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), property, any mineral deposit, or the marine, coastal, or human environment, a civil penalty may be assessed without regard to the requirement of expiration of a period allowed for corrective action.

(c) Criminal penalties.

Any person who knowingly and willfully (1) violates any provision of this Act, any term of a lease, license, or permit issued pursuant to this Act, or any regulation or order issued under the authority of this Act designed to protect health, safety, or the environment or conserve natural resources, (2) makes any false statement, representation, or certification in any application, record, report, or other document filed or required to be maintained under this Act, (3) falsifies, tampers with, or renders inaccurate any monitoring device or method of record required to be maintained under this Act, or (4) reveals any data or information required to be kept confidential by this Act shall, upon conviction, be punished by a fine of not more than $100,000, or by imprisonment for not more than ten years, or both. Each day that a violation under clause (1) of this subsection continues, or each day that any monitoring device or data recorder remains inoperative or inaccurate because of any activity described in clause (3) of this subsection, shall constitute a separate violation.

(d) Liability of corporate officers and agents for violations by corporation.

Whenever a corporation or other entity is subject to prosecution under subsection (c) of this section, any officer or agent of such corporation or entity who knowingly and willfully authorized, ordered, or carried out the proscribed activity shall be subject to the same fines or imprisonment, or both, as provided for under subsection (c) of this section.

(e) Concurrent and cumulative nature of penalties.

The remedies and penalties prescribed in this Act shall be concurrent and cumulative and the exercise of one shall not preclude the exercise of the others. Further, the remedies and penalties prescribed in this Act shall be in addition to any other remedies and penalties afforded by any other law or regulation.

43 U.S.C. § 1801 (2003)

§ 1801. Congressional findings

The Congress finds and declares that—

(1) the demand for energy in the United States is increasing and will continue to increase for the foreseeable future;

(2) domestic production of oil and gas has declined in recent years;

(3) the United States has become increasingly dependent upon imports of oil from foreign nations to meet domestic energy demand;

(4) increasing reliance on imported oil is not inevitable, but is rather subject to significant reduction by increasing the development of domestic sources of energy supply;

(5) consumption of natural gas in the United States has greatly exceeded additions to domestic reserves in recent years;

(6) technology is or can be made available which will allow significantly increased domestic production of oil and gas without undue harm or damage to the environment;

(7) the Outer Continental Shelf contains significant quantities of oil and natural gas and is a vital national resource reserve which must be carefully managed so as to realize fair value, to preserve and maintain competition, and to reflect the public interest;

(8) there presently exists a variety of technological, economic, environmental, administrative, and legal problems which tend to retard the development of the oil and natural gas reserves of the Outer Continental Shelf;

(9) environmental and safety regulations relating to activities on the Outer Continental Shelf should be reviewed in light of current technology and information;

(10) the development, processing, and distribution of the oil and gas resources of the Outer Continental Shelf, and the siting of related energy facilities, may cause adverse impacts on various States and local governments;

(11) policies, plans, and programs developed by States and local governments in response to activities on the Outer Continental Shelf cannot anticipate and ameliorate such adverse impacts unless such States, working in close cooperation with affected local governments, are provided with timely access to information regarding activities on the Outer Continental Shelf and an opportunity to review and comment on decisions relating to such activities;

(12) funds must be made available to pay for the prompt removal of any oil spilled or discharged as a result of activities on the Outer Continental Shelf and for any damages to public or private interests caused by such spills or discharges;

(13) because of the possible conflicts between exploitation of the oil and gas resources in the Outer Continental Shelf and other uses of the marine environment, including fish and shellfish growth and recovery, and recreational activity, the Federal Government must assume responsibility for the minimization or elimination of any conflict associated with such exploitation;

(14) the oil and gas resources of the Outer Continental Shelf are limited, nonrenewable resources which must be

developed in a manner which takes into consideration the Nation's long-range energy needs and also assures adequate protection of the renewable resources of the Outer Continental Shelf which are a continuing and increasingly important source of food and protein to the Nation and the world; and

(15) funds must be made available to pay for damage to commercial fishing vessels and gear resulting from activities involving oil and gas exploration, development, and production on the Outer Continental Shelf.

43 U.S.C. § 1802 (2003)

§ 1802. Congressional declaration of purposes

The purposes of this Act are to—

(1) establish policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf which are intended to result in expedited exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade;

(2) preserve, protect, and develop oil and natural gas resources in the Outer Continental Shelf in a manner which is consistent with the need (A) to make such resources available to meet the Nation's energy needs as rapidly as possible, (B) to balance orderly energy resource development with protection of the human, marine, and coastal environments, (C) to insure the public a fair and equitable return on the resources of the Outer Continental Shelf, and (D) to preserve and maintain free enterprise competition;

(3) encourage development of new and improved technology for energy resource production which will eliminate or minimize risk of damage to the human, marine, and coastal environments;

(4) provide States, and through States, local governments, which are impacted by Outer Continental Shelf oil and gas exploration, development, and production with comprehensive assistance in order to anticipate and plan for such impact, and thereby to assure adequate protection of the human environment;

(5) assure that States, and through States, local governments, have timely access to information regarding activities on the Outer Continental Shelf, and opportunity to review and comment on decisions relating to such activities, in order to anticipate, ameliorate, and plan for the impacts of such activities;

(6) assure that States, and through States, local governments, which are directly affected by exploration, development, and production of oil and natural gas are provided an opportunity to participate in policy and planning decisions relating to management of the resources of the Outer Continental Shelf;

(7) minimize or eliminate conflicts between the exploration, development, and production of oil and natural gas, and the recovery of other resources such as fish and shellfish;

(8) establish an oilspill liability fund to pay for the prompt removal of any oil spilled or discharged as a result of activities on the Outer Continental Shelf and for any damages to public or private interest caused by such spills or discharges;

(9) insure that the extent of oil and natural gas resources of the Outer Continental Shelf is assessed at the earliest practicable time; and

(10) establish a fishermen's contingency fund to pay for damages to commercial fishing vessels and gear due to Outer Continental Shelf activities.